

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs February 3, 2009

STATE OF TENNESSEE v. KEITH LINDSEY

Direct Appeal from the Circuit Court for Rutherford County
No. F-60123 James K. Clayton, Jr., Judge

No. M2008-01196-CCA-R3-CD - Filed November 12, 2009

The Defendant-Appellant, Keith Lindsey (“Lindsey”), was convicted by a Rutherford County jury of incest, sexual battery by an authority figure, and two counts of rape. He received an effective sentence of eleven years in the Tennessee Department of Correction. On appeal, he argues: (1) the trial court erred by not allowing the defense to re-open its proof; and (2) the trial court erred by imposing consecutive sentences. Following our review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

CAMILLE R. McMULLEN, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and J. C. McLIN, JJ., joined.

Gerald L. Melton, District Public Defender; John P. Driver and S. Ray White, Assistant Public Defenders, Murfreesboro, Tennessee, for the Defendant-Appellant, Keith Lindsey.

Robert E. Cooper, Jr., Attorney General and Reporter; Melissa Roberge, Assistant Attorney General; William C. Whitesell, Jr., District Attorney General; and Laural Hemenway, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Facts. Lindsey’s daughter, Ke’Andra Lindsey (“the victim”), who was sixteen years old at the time of the offense, testified that on December 11, 2006, at 12:30 a.m., she awoke to use the bathroom. Lindsey called her into his room, told her to sit on his bed, and began to discuss household rules. The victim testified that Lindsey touched her vagina with his fingers. He then held her legs down and penetrated her with his penis. She said she was in Lindsey’s room for about an hour. She then went to the bathroom where she said it hurt to urinate. She returned to her room, which she shared with her sister, Keshana. She did not tell anyone what happened until the next day at school. She told Keshana about the incident at lunch. The victim also told a school officer that Lindsey sexually assaulted her.

The victim was taken to a medical center that afternoon where she underwent a detailed physical examination. A nurse practitioner testified that she examined the victim approximately eight and a half hours after the victim said the sexual assault occurred. The nurse said the victim had a small tear at the bottom of her genital area which was “very consistent” with the victim’s statements that she experienced burning, bleeding, and pain urinating.

During the physical examination, the nurse collected four swabs from the victim’s cervical area. An expert in genetics testified that these swabs were screened at his laboratory, and there was a low quantity of sperm present. The geneticist compared Deoxyribonucleic Acid (DNA) from this sperm to DNA later extracted from the defendant. The geneticist said all the defendant’s genetic markers were present in the sperm fraction. The geneticist testified that “it’s a fairly rare chance that another individual would match that profile”.

The victim wrote a letter explaining that she had lied about being sexually violated by Lindsey. She testified that she wrote the letter because she did not want Lindsey to go to jail. She also said that her aunt told her to write the letter because Lindsey, who is a diabetic, did not need to be imprisoned.

On November 28, 2007, the third day of the trial, Lindsey testified that on the night of the offense he never touched the victim sexually because he went to his room between 6:00 and 6:30 p.m. and fell asleep. He did not see the victim until 7:00 a.m. the next morning. After Lindsey testified, the defense rested. The State called a detective as a rebuttal witness who explained how a DNA sample was obtained from Lindsey. Following the detective’s testimony, the trial court asked both parties if they had any further witnesses. Both parties stated that they did not. The trial court advised the jury that because of time constraints they would resume the case on Tuesday, December 4, 2007, with arguments and the charge of the court.

On December 4, 2007, the defense requested to re-open their case and call Keshana Lindsey as a rebuttal witness. The State objected because it would cause an undue delay in the trial and the intended proof was not newly discovered evidence. The trial court denied Lindsey’s request, but allowed him to make an offer of proof.

Keshana testified that she had not been previously available because she had been pregnant. She stated that on the night of the offense, she and the victim watched movies together in the living room from 7:00 p.m. to 2:00 a.m. Around 9:00 p.m., Lindsey entered the living room and told them that he was going to bed. After finishing the movies, Keshana said she and the victim went to their bedroom where they share a bunk bed. Keshana did not see the victim enter their father’s bedroom during the night. She also did not recall the victim awakening to use the bathroom. Keshana testified that the victim appeared “fine” that morning, but was “walking funny” at school. At lunch, the victim told Keshana what happened. Keshana testified that she did not initially believe the victim because she could not “grasp” or “cope” with what the victim said occurred.

Sentencing Hearing. The trial court sentenced Lindsey to eight years for his two convictions for rape to be served concurrently. The trial court determined that the three-year sentence for sexual battery by an authority figure should run concurrent with the convictions for rape. The trial court found that the defendant's three-year sentence for incest should be served consecutive to his other convictions. The trial court did not state on the record, however, why it imposed consecutive sentencing other than stating that incest is a "separate offense". The defendant was sentenced to a total of eleven years in the Tennessee Department of Correction.

ANALYSIS

I. Denial of Request to Re-open Proof. Lindsey claims that the trial court abused its discretion by not allowing Keshana Lindsey to testify. He contends that Keshana's testimony was critical because it undermined the victim's credibility. In response, the State argues that the trial court did not abuse its discretion because Lindsey failed to show that any injustice resulted from the trial court's decision. The State also asserts that Lindsey did not demonstrate how Keshana's testimony would have changed the outcome of the trial. We agree with the State.

The decision to re-open proof is within the discretion of the trial court, and it will not be overturned on appeal without a showing of injustice. Simpson v. Frontier Cmty. Credit Union, 810 S.W.2d 147, 149 (Tenn. 1991); State v. Brock, 940 S.W.2d 577, 580 (Tenn. Crim. App. 1996). The defendant must show that a different result probably would have occurred if the defendant had been permitted to introduce the evidence. State v. Bell, 690 S.W.2d 879, 882 (Tenn. Crim. App. 1985); see also State v. Moore, 775 S.W.2d 372, 375 (Tenn. Crim. App. 1989).

Upon review of the record, we conclude that the trial court did not abuse its discretion by not allowing the defense to re-open its proof. Further, Lindsey has failed to show that the trial court's ruling resulted in an injustice. After the third day of trial, the trial court asked the Lindsey if he had any further witnesses. Lindsey stated that he did not have any further witnesses even though he was aware of Keshana's involvement in the case. He did not inform the trial court that Keshana was unavailable for pregnancy reasons or that her testimony was important to his defense. Regardless, in the offer of proof, Keshana said that the victim went to bed at 2:00 a.m. and that she did not see the victim go into Lindsey's room at any point during the night. Additionally, Keshana testified that she did not initially believe the victim was raped because she could not "grasp" or "cope" with what the victim said their father did to her. We agree that Keshana's testimony raised questions about the victim's credibility. However, given the strength of the State's proof, we cannot conclude that Keshana's testimony would have dictated a different result. Accordingly, the trial court did not abuse its discretion, and therefore Lindsey is not entitled to relief on this issue.

II. Consecutive Sentencing. Lindsey claims the trial court erred in ruling that his conviction for incest should run consecutive to his other convictions. He argues that his sentences should all run concurrently because the trial court did not state on the record which criteria, under Tennessee Code Annotated section 40-35-115(b), was satisfied. The State contends that despite the

trial court's failure to state which criteria was met, sufficient evidence is in the record to uphold the imposition of consecutive sentences.

On appeal, we must review issues regarding the length and manner of service of a sentence de novo with a presumption that the trial court's determinations are correct. T.C.A. § 40-35-401(d) (2006). Nevertheless, "the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). Therefore, if the court fails to comply with the statutory requirements, our review is de novo without the presumption of correctness. State v. Jones, 883 S.W.2d 597, 600 (Tenn.1994). The defendant, not the State, has the burden of showing the impropriety of the sentence. T.C.A. § 40-35-401(d) (2006), Sentencing Commission Comments. Here, the trial court imposed consecutive sentences under Tennessee Code Annotated section 40-35-115(b) without stating which of the criteria under subsection (b) was satisfied. Accordingly, our review in this case is de novo without a presumption of correctness.

A trial court may order multiple offenses to be served consecutively if it finds by a preponderance of the evidence that a defendant fits into at least one of the following seven criteria in section 40-35-115(b):

- (1) The defendant is a professional criminal who has knowingly devoted the defendant's life to criminal acts as a major source of livelihood;
- (2) The defendant is an offender whose record of criminal activity is extensive;
- (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
- (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
- (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
- (6) The defendant is sentenced for an offense committed while on probation; or
- (7) The defendant is sentenced for criminal contempt.

T.C.A. § 40-35-115(b) (2006).

In the present case, the trial court ordered Lindsey's conviction for incest to be served consecutively to his other convictions. While we acknowledge that the record contains limited findings by the trial court, the record supports the imposition of a consecutive sentence. Under section 40-35-115(b), category (5) was met, as Lindsey was convicted of four statutory offenses involving the sexual abuse of his minor child. Additionally, the aggravating circumstances surrounding these convictions clearly warrant consecutive sentencing. Because Lindsey satisfies at least one of the categories set forth in section 40-35-115(b), we affirm the imposition of a consecutive sentence by the trial court.

Conclusion. Based upon the foregoing, Lindsey's judgments of conviction are affirmed.

CAMILLE R. McMULLEN, JUDGE